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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DAREN MARK GONZALES, Defendant and Appellant.	G045508 (Super. Ct. No. 10CF3174) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Scott A. Steiner, Judge. Affirmed.

Donna L. Harris, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William W. Wood and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Daren Mark Gonzales guilty of transportation and possession of methamphetamine, the latter crime as a lesser included offense of the charged crime of possession of methamphetamine for sale.[1] He admitted a prior serious felony conviction within the meaning of the "Three Strikes" law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (b)-(i)),[2] and section 667, subdivision (a)(1), and he admitted serving two prior prison terms (§ 667.5, subd. (b)). After denying Gonzales' motion to strike his prior conviction for sentencing purposes (§ 1385, subd. (a)), the trial court imposed a total prison term of six years.

Gonzales contends his conviction for possession of methamphetamine must be reversed because it is a lesser included offense of transportation of methamphetamine. He acknowledges the contrary authority of *People v. Rogers* (1971) 5 Cal.3d 129 (*Rogers*), *People v. Watterson* (1991) 234 Cal.App.3d 942 (*Watterson*), and *People v. Thomas* (1991) 231 Cal.App.3d 299 (*Thomas*), but argues *Rogers* and its progeny are wrongly decided and should be reconsidered. As an intermediate court, we are bound to follow the decisions of our Supreme Court. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Moreover, for reasons explained below, we do not agree with Gonzales' analysis of the issue and would reach no different result were the option available to us.

Gonzales also challenges the trial court's denial of his section 1385 motion to strike the prior conviction for sentencing. Based on our review of the trial transcript and probation report, Gonzales is the quintessential repeat felon envisioned by the Three Strikes law. Under the circumstances, Gonzales fails to meet his burden of establishing

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[1] The jury found Gonzales not guilty of street terrorism and found not true an alleged gang enhancement.

[2] All further statutory references are to the Penal Code.

the trial court abused its discretion by denying his motion. Consequently, the judgment is affirmed in its entirety.

FACTS

Around 9:00 p.m. on May 28, 2010, Tustin Police Officer Diego Gomez stopped a gold Chevrolet Tahoe for traffic violations. As the car slowed to a stop, Gomez noticed the driver and passenger moving around and making furtive motions with their hands. Gomez and his partner, Officer Polling, contacted the driver, Gonzales, and his passenger, Elizabeth Zavala. Gomez told Gonzales why he had been stopped. As he talked, he also saw Zavala move her hands toward her genitals and adjust her clothing. Gomez asked Gonzales to get out of the car while Polling kept on eye on Zavala in the car. Gomez searched Gonzales and found $30 in his pocket. He found two cell phones in the car. One of the cell phones, the one later linked to Zavala, had a text message from Gonzales stating, "'sell some shit.'"

When Polling asked Zavala to get out of the car, she initially refused. When she finally did get out of the car, she would not sit on the curb. Polling thought Zavala looked very nervous so he asked her if she was carrying an illegal substance. She denied that she was. When Polling expressed his disbelief at her denial, Gonzales said, "You can't search her. She is not on parole."

Gomez thought Zavala might be hiding something in her clothing and radioed for a female officer to come and search her. The female officer watched Zavala as she removed a large clear baggie containing four small green baggies from the clothing around her genitals. A presumptive drug test was positive for methamphetamine. Laboratory analysis confirmed the presumptive test. The four individual baggies contained less than one gram of methamphetamine.

Zavala testified pursuant to a plea agreement. She said Gonzales had picked her up after work and they drove together to a friend's apartment. Zavala took a

shower at the friend's apartment and they got back into Gonzales's car. They were about to drive out of the apartment complex parking lot when Gonzales got a cell phone call. Shortly after the call and while they were still in the apartment complex parking lot, Zavala witnessed a white male meet Gonzales. The two men exchanged something and Gonzales returned to the car.

As Gonzales drove out of the apartment complex, Zavala noticed they were being followed by a police car. Gonzales exclaimed, "Shit, there is a cop behind us[]" and he tossed a baggie onto Zavala's lap. He directed her to hide the drugs in her genitals. She complied because she was afraid he would hit her. Although she initially denied possessing any drugs, she eventually told the female officer the truth and removed the drugs from her pants.

Gonzales called three witnesses. A female witness testified she had frequently ingested methamphetamine with Gonzales when they were boyfriend and girlfriend. Another friend testified he had never saw Gonzales with drugs, but that he suspected Gonzales and Zavala were using drugs. Gonzales' mother testified she had never seen him use drugs, nor did he have drugs in her home. However, she did admit she had seen a methamphetamine pipe in the house one week before his most recent arrest.

DISCUSSION

Simple Possession Is Not a Lesser Included Offense of Transportation

The information charged Gonzales with transportation of methamphetamine and possession of methamphetamine for sale. The jury acquitted him of possession for sale, but convicted him of the lesser included offense of simple possession. The court imposed a section 654[3] stay on the sentence for simple possession,

[3] Section 654, subdivision (a) states, in pertinent part, "An act or omission that is punishable in different ways by different provisions of law shall be punished under

but Gonzales claims we must reverse the conviction for simple possession because it is a lesser included offense of transportation of methamphetamine. We disagree.

Section 654 has been interpreted to preclude separate punishment where multiple convictions arise from a "course of conduct" with a single criminal objective. (*People v. Beamon* (1973) 8 Cal.3d 625, 638; see also *Neal v. State of California* (1960) 55 Cal.2d 11, 19 (*Neal*), disapproved on other grounds in *People v. Correa* (2012) 54 Cal.4th 331, 341; *People v. Latimer* (1993) 5 Cal.4th 1203 [reaffirming *Neal*].) On the other hand, "a person may be *convicted* of, although not *punished* for, more than one crime arising out of the same act or course of conduct. 'In California, a single act or course of conduct by a defendant can lead to convictions "of *any number* of the offenses charged." [Citations.]' [Citation.]" (*People v. Reed* (2006) 38 Cal.4th 1224, 1226-1227 (*Reed*).) The sole exception being when one crime cannot be committed without also necessarily committing the lesser offense. In that instance, the lesser crime is necessarily included in the greater offense and only a single conviction is proper. (*Id.* at p. 1227.) However, while simple possession of a controlled substance is a lesser included offense of possession of that substance for sale (*People v. Tinajero* (1993) 19 Cal.App.4th 1541, 1547), it is not a lesser included offense of transportation of a controlled substance. (*Rogers, supra,* 5 Cal.3d at p. 134; *Watterson, supra,* 234 Cal.App.4th at p. 42; *Thomas, supra,* 231 Cal.App.3d at p. 305.)

To the extent Gonzales attempts to rely on the accusatory pleading test, we must reject the argument. Although the accusatory pleading test applies to crimes not charged in the information but found in the evidence, the determination of whether one offense is necessarily included within another must be based on the "elements" test. The *Reed* court made this point crystal clear. When deciding whether multiple convictions

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the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

are proper, a court should consider only the statutory elements. (*Reed, supra*, 38 Cal.4th at p. 1229.)

Gonzales claims "[t]the only difference between the two offenses is [the fact] an additional element of transportation is required to prove a violation of section 11379." But the *Rogers* court concluded otherwise: "Although possession is commonly a circumstance tending to prove transportation, it is not an essential element of that offense and one may 'transport' [controlled substances] even though they are in the exclusive possession of another. [Citations.]" (*Rogers, supra,* 5 Cal.3d at p. 134, fn. omitted.) Moreover, the court disapproved of *People v. Solo* (1970) 8 Cal.App.3d 201, 206 and *People v. Sanders* (1967) 250 Cal.App.2d 123, 134, two cases that held possession of a controlled substance was an element of transportation of a controlled substance. Under the circumstances, the Attorney General correctly relies on the doctrine of stare decisis.

Gonzales asserts if the pattern instructions given by the court are correct, "it necessarily follows that one cannot transport contraband without possessing it . . . ." Again, we disagree.

In addition to other pertinent instructions, the court gave CALCRIM No. 2300 (the standard instruction for transportation), CALCRIM No. 2302 (the standard instruction for possession for sale of controlled substances), and CALCRIM No. 2304 (the standard instruction for simple possession of a controlled substance).[4] Pursuant to CALCRIM No. 2300, the court stated, "[t]o prove that the defendant is guilty of [transportation of methamphetamine], the People must prove that, one, the defendant transported a controlled substance; two, the defendant knew of its presence; three, the

[4] Although the information did not charge Gonzales with simple possession of methamphetamine, the court had a sua sponte duty to give an instruction on simple possession because possession is a lesser included offense of possession of methamphetamine for sale. (*People v. Saldana* (1984) 157 Cal.App.3d 443, 453-458.)

defendant knew of the substances' nature or character as a controlled substance; four, the controlled substance was methamphetamine; and five, the controlled substance was in a usable amount." The court defined the term "transportation" and the concept of a "useable amount" and then read the following paragraph: "A person does not have to actually hold or touch something to transport it. It is enough if the person has control over it or the right to control it either permanently or through another person."

Relying on this instruction, Gonzales claims the term "control" is the "logical equivalent" of possession, either actual or constructive, and "[i]f CALCRIM [No.] 2300 is a correct statement of the law, it necessarily follows that one cannot transport contraband without possessing it, and that possession of methamphetamine is a lesser included offense to the crime of transporting the substance." But we do not agree the terms control and possession are interchangeable as logical or legal equivalents. To the contrary, the driver of a vehicle controls the when, where, and how of moving a controlled substance from one place to another, but he or she need not have actual or even constructive possession of the controlled substance during its transport.

The *Rogers* court stated it best. "Regardless of [the defendant's] purpose or intent, the driver or owner of an automobile has the responsibility to prevent the conveyance of contraband by himself or his passengers, at least while that vehicle is under his dominion or control. Proof of his knowledge of the character and presence of the drug, together with his control over the vehicle, is sufficient to establish his guilt without further proof of an actual purpose to transport the drug for sale or distribution. [Citations.]" (*Rogers, supra,* 5 Cal.3d at pp. 135-136.) Furthermore, "Although possession is commonly a circumstance tending to prove transportation, it is not an essential element of that offense and one may 'transport' [a controlled substance] even though they are in the exclusive possession of another. [Citations.]" (*Id.* at p. 134.)

We agree with the *Rogers* court's analysis. Simple possession of a control substance is not a necessarily included offense of transportation of that controlled

substance. Consequently, Gonzales may properly be convicted of transportation of methamphetamine and simple possession of methamphetamine.

The Trial Court Did Not Abuse Its Sentencing Discretion

Gonzales' sentencing brief invited the trial court to vacate his "strike" prior for sentencing purposes. The court declined to do so and Gonzales claims the court's denial amounts to an abuse of discretion. We disagree.

Section 1385, subdivision (a), states, "The judge . . . may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." In *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), the California Supreme Court ruled a trial court may strike or vacate an allegation or finding under the Three Strikes law in furtherance of justice. (*People v. Williams* (1998) 17 Cal.4th 148, 158, (*Williams*).) The trial court's ruling is reviewable for an abuse of discretion regardless of the court's ultimate decision. (*People v. Carmony* (2004) 33 Cal.4th 367, 373 (*Carmony*); *Romero, supra,* 13 Cal.4th at p. 531)

Our review is guided by two fundamental principles. First, Gonzales bears the burden to demonstrate the trial court's sentence is irrational or arbitrary. (*Carmony, supra,* 33 Cal.4th at p. 376.) If he fails in this effort, we presume the trial court's decision was based on legitimate sentencing objectives, and its determination will not be set aside by a reviewing court. (*Id.* at pp. 376-377.) Second, we do not reverse a decision simply because reasonable people might disagree. (*Id.* at p. 377.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Ibid.*)

The court gave the following reasons for declining to vacate Gonzales' strike prior: "[T]he current offense involved the deliberate attempt by the defendant not only to acquire methamphetamine while on parole, and despite having been convicted of numerous felonies, but [also] forced his girlfriend to secrete said methamphetamine in her genitals. [¶] The court further notes that the defendant's prior strike, which he now

seeks to have this court ignore, is for possessing a firearm while an active participant in a street gang. And notes further that the current offense was committed less than four years following this strike conviction. [¶] The court finds that the strike prior is hardly the defendant's first contact with the law in that he has been convicted of various other offenses with some degree of regularity since 2000, and which such convictions are of increasing seriousness. Despite having received numerous grants of probation and despite being on parole at the time of the instant offense, the defendant continued to engage in felony conduct."

The record supports the trial court's findings. According to the probation report, Gonzales has repeatedly run afoul of the law since his early teens. His record includes misdemeanor and felony convictions ranging from vandalism to burglary, assault with a firearm, drug possession, possession of a firearm, street terrorism, and a failure to register as a member of a criminal street gang. He was on parole following a conviction for possession of a firearm when he committed the current offense. He points to the amount of methamphetamine possessed, which was less than one gram, and contends his punishment does not fit the crime. However, we see no reason to treat Gonzales "'"as though he actually fell outside the Three Strikes scheme."' [Citation.]" (*Carmony, supra,* 33 Cal.4th at p. 377.)

As stated in *Williams, supra,* 17 Cal.4th at page 161, "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to Penal Code section 1385 [subdivision] (a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." In this case, the trial

court considered the proper factors and reasonably determined Gonzales was within the spirit of the Three Strikes law. Our review of the record exposes no basis for disagreement with its assessment.

Gonzales takes issue with the trial court's findings he carried out the crime with planning and sophistication, and he possessed methamphetamine with the intent to furnish it to Zavala. The court made these statements in conjunction with its determination of Gonzales' eligibility for section 1210 drug treatment, not with respect to his request to avoid the enhanced penalty required under the Three Strikes law. But even assuming the court considered these factors in denying his section 1385 request, the evidence supports the court's findings. First, Gonzales did plan the crime. He had the drugs, some cash, and a cell phone in his possession at the time of his arrest. Second, he admitted to the probation officer that he possessed the methamphetamine so he could "get 'high' with [Zavala.]" Both findings are thus amply supported by the record, and based on the record, Gonzales fails to demonstrate the trial court's exercise of its sentencing discretion was unreasonable.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

FYBEL, J.